IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

NO. 506

MAY S. TONKIN and PEOPLES-PITTSBURGH TRUST COMPANY, Executors of the Estate of John B. Tonkin, Petitioners,

v.

THE UNITED STATES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully ask for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit to review a decision of that court entered on July 3, 1945 (re-hearing denied August 2, 1945) which reversed a judgment entered by the District Court for the Western District of Pennsylvania in favor of petitioners in the amount of $45,930.95 with interest.

The reversal was prompted by the decision of this court in *Goldstone et al. v. United States of America,* 65 Supreme Ct. 1323, decided June 11, 1945, five days after the instant case had been argued before the Circuit Court of Appeals.

SUMMARY STATEMENT.

On October 24, 1943 the petitioners filed this suit against The United States for a refund in the amount of $45,930.95 which they paid under protest on a claim for deficiency in estate tax.

The petitioner's decedent, John B. Tonkin, had been President of Peoples Natural Gas Company, a subsidiary of the Standard Oil Company of New Jersey. During the 41 years he had been employed he had acquired more than 10,000 shares of stock in the Standard Oil Company of New Jersey. He determined that these holdings were too large and decided to dispose of some of the stock. He did so and purchased five annuity contracts in various insurance companies for which he paid $75,415. (Finding of Fact 10, R. 46 a).

At the same time on December 3, 1936 Tonkin created an *inter vivos* trust by the terms of which he transferred the following assets to the Peoples-Pittsburgh Trust Company as trustee under an irrevocable trust in which he retained no incidents of ownership nor provided for any reverter (R. 5 a, 27 a, 35 a):

(1) 2204 shares of Standard Oil Company stock;

(2) Three policies of life insurance aggregating $36,300 (these policies were taken out many years before by the settlor and were transferred to the trustee without retaining any incidents of ownership);

(3) Six policies of life insurance aggregating $40,000 (the settlor retained control over these policies and the executors included them in his gross estate; they are therefore not involved in this proceeding).

The trust agreement provided that the settlor's wife could, if she wished, instruct the trustee to purchase either ordinary or single premium life insurance policies on the life of the settlor, and if the trustee had insufficient cash to pay the premiums, it could sell other assets in the trust and use the proceeds. (R 30 a)

Shortly after the creation of the trust, the wife of the settlor instructed the trustee to purchase single premium life insurance policies. (R. 40 a). The trustee sold the 2204 shares of Standard Oil Company stock and purchased five single premium policies having a face value of $200,000. The Commissioner (R. 12 a) included in the gross estate of the decedent the following:

(1) $200,042.98, the proceeds of the five single premium policies.

(2) $36,902.52, the proceeds of three life insurance policies irrevocably assigned to the trustee.

(3) $1,840.26, the uninvested cash in the trust at decedent's death.

The tax deficiency was paid under protest.

The suit for refund filed by petitioners was based on the theory that none of the three items were includible in decedent's gross estate, because Tonkin had irrevocably transferred all interest in the trust when it was created in 1936, so that nothing passed at the time of his death in 1940.

The defense of the government was that the trust was

1. A transfer made in contemplation of death, and

2. A transfer intended to take effect in possession or enjoyment at or after death. (This defense applies only to the proceeds of the five single premium policies.)

The Trial Judge found that the trust was not made in contemplation of death. (Conclusion of Law I, R 51 a).

He also held that the annuities purchased by Tonkin were complete transactions in themselves and did not depend upon any action taken by Mrs. Tonkin or by the trustee. (Finding of Fact 13, R 47 a). The court therefore concluded that the proceeds of the five single premium policies were not includible in the decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after death. (Conclusion of Law II, R 51 a).

The court therefore entered judgment in favor of the petitioners in the amount of $45,930.95 with interest: 56 F. Supp. 817 (1944). The government appealed and the Circuit Court of Appeals reversed. The opinion of the Circuit Court of Appeals was filed July 3, 1945 and is reported in 150 F. (2d) 531; rehearing was denied on August 2, 1945.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 of the Judicial Code as amended and more particularly because an important question of federal law is involved which has not been, but should be settled by this court.

QUESTIONS PRESENTED.

1. Where a settlor executes a trust by which he irrevocably transfers assets to a trustee and there is no provision whatsoever in the trust agreement for the reversion of the property under any circumstances to the settlor, does a possibility of reverter by operation of law—in the event that all of the beneficiaries die before the settlor—operate to make the transfer one intended to take effect in possession or enjoyment at or after death within the provisions of Section 302(c) of the Revenue Act of 1926 as amended?

2. Where the trial court makes findings that transfers were not made in contemplation of death and those findings are so overwhelmingly supported by the evidence that the government acquiesces in them and limits its appeal to two other grounds, is the question of contemplation of death before the appellate court for review?

3. Where the trial court found that the purchase of annuities by the decedent was an independent and unrelated transaction, and the transfer of stock to a trustee was complete and final, does the fact that the trustee sold the stock and purchased single premium policies with the proceeds make the proceeds of the policies includible in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after death under the provisions of Section 302(c)?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Goldstone case decided by this Honorable Court on June 11, 1945 (65 Supreme Ct. 1323) on which the Circuit Court of Appeals for the Third Circuit relied, has no application to the case at bar.

In the Goldstone case decedent purchased an annuity contract and a single premium policy and transferred all of his interest in both contracts to his wife; but if she died before he did, he provided that those rights were to revert to him. This court said the essential element was the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property.

For this reason the court concluded that the proceeds of both contracts were taxable as part of decedent's gross estate.

In the case at bar it is conceded that the settlor retained no reversionary interest in the proceeds of either the annuity contracts or the single premium life insurance policies. The annuities were purchased by Tonkin and were never transferred to anyone. Payments under the annuity contracts ceased upon his death. The trust agreement did not include the annuity contracts. By the trust agreement Tonkin transferred 2204 shares of Standard Oil stock and some other policies of insurance. The Standard Oil stock was sold by the trustee who purchased single premium life insurance policies. The trust agreement does not contain any

provision for the reversion of any of the trust assets to the settlor.

The possibility of reverter on which the government relied was a reverter by operation of law, in the event that all of the beneficiaries named in the trust died before the settlor. This question, whether a possibility of reverter by operation of law makes transfers taxable, was not raised in the trial court and has not been decided by this Court. If the government were to prevail on this issue, every irrevocable trust in which the beneficiaries are mortal would be subject to tax. A possibility of reverter by operation of law is not like the retention by a settlor of a reversionary interest. Indeed it is just the opposite. The settlor has made no provision for a return of the assets to him. He has attached no string or tie in the trust indenture whereby he might pull back the corpus to himself: *Com. v. Kellogg,* 119 F. 2d 54 (C.C.A. 3, 1941). He has done everything humanly possible to separate himself from his assets. In such a case the possibility of reverter arbitrarily attaches despite the settlor's complete termination of his interest: *Lloyd's Estate v. Com.,* 141 F. 2d 758 (C.C.A. 3, 1944).

The Circuit Court's decision that the trust assets were taxable, because of the possibility of reverter by operation of law, should be reviewed by this court; especially as the same court only a few weeks before had carefully distinguished gifts in which the settlor "positively" reserved rights and those where the reverter was "passive": *Eldredge v. Rothensies,* 150 F. 2d 23, decided by the Third Circuit Court of Appeals on June 12, 1945.

In the *Est. of H. I. Pratt, dec'd. v. Com.,* 5 T.C., No. 106, the Tax Court just held (Sept. 28, 1945) that the remote possibility that assets might revert to decedent by operation of law, if all the beneficiaries died before the decedent, did not make the corpus includible in decedent's gross estate.

2.

The lower court found as a fact that the transfers made by Tonkin were not made in contemplation of death. The evidence in support of these findings was so overwhelming that the government abandoned this ground in its appeal to the Circuit Court. Neither side therefore argued the question and it was not presented to the Circuit Court either in the briefs or oral arguments.

The court nevertheless reversed the lower court and found as a fact that the transfers were made in contemplation of death.

This is contrary to the position universally adopted with respect to findings of a trial court. In *Supornick v. Com.*, 150 F. 2d 110 (C.C.A. 8, 1945) the Circuit Court said (page 111):

> "We must look primarily upon the evidence in support of the Tax Court's findings, inferences and conclusions; and, if we find a substantial basis for such findings present in the evidence, 'the process of judicial review is at an end.'"

We think the court erred in considering the question of contemplation of death.

3.

The Circuit Court held that the purchase of annuities by Tonkin and the purchase of single premium life insurance policies by the trustee constituted a single indivisible transaction, and that therefore the transfer of *all* of the assets to the trust was made in contemplation of death.

In the first place, the finding by the District Court that the two transactions were separate and apart was binding on the Circuit Court: *Dobson v. Com.*, 320 U. S. 489 (1943).

Even if the Circuit Court had been justified in reversing this finding, it still would not follow that *all* of the assets in the trust were taxable.

If the purchase of annuities and the purchase of single premium policies constituted an indivisible transaction, the proceeds of the single premium policies might be taxable as a transfer intended to take effect in possession or enjoyment at or after death. But the indivisibility of these transactions has no relation whatever to the three policies of insurance, the proceeds of which amounted to $36,920.52 and the cash in the trust amounting to $1840.26. The Circuit Court has not disposed of these two items under this reasoning.

Coming back to the taxability of the proceeds of the five single premium policies, the conclusion of the Circuit Court could be correct only if it were based upon a finding that Mrs. Tonkin and the trustee were but the tools or alter ego of Tonkin. There is no evidence in the case to justify such a finding. The District Court found that the purchase of annuities by Tonkin was a separate and unrelated transaction from which Tonkin obtained advantages in federal income and state personal property taxes. It made no difference to Tonkin whether or not single premium policies were purchased. Mrs. Tonkin and the trustee were free to do as they liked about the purchase of such policies. The gift to the trustee was complete and final as far as Tonkin was concerned.

On August 18, 1945 the District Court of the United States for the Southern District of Indiana in *Dickson v. Smith* (the opinion is reported in C.C.H. Inheritance, Estate and Gift Tax Service, paragraph 10226, page 8271) had before it precisely the same question as is involved in this case. There the settlor purchased annuities and gave Inland Steel stock to his three children. They in turn sold the stock and purchased single premium life insurance policies on the life of their father. The court held that the transfer of the stock to the children "constituted final, complete and absolute gifts to them and there was no understanding or agreement that the children should be required to use the proceeds of the gift in any specified manner."

The court therefore concluded that the transfers of stock were not made in contemplation of death or to take effect in possession or enjoyment at or after death.

In the case at bar the trial court found that Mrs. Tonkin, in requesting the trustee to purchase single premium policies, and the trustee, in purchasing the single premium policies, were free and independent agents. The court also found that it made no difference to Tonkin whether policies were purchased or not. There is no evidence in the case of any plan or agreement between any of the parties. Under these circumstances we think Judge Gibson in the District Court, who tried the case, correctly decided that the transfer of stock was not made to take effect in possession or enjoyment at or after death.

It is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

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